In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1534

LOCAL UNION NO. 167, PROGRESSIVE MINE WORKERS OF AMERICA, PETITIONER

v

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. C1–C9) is reported at 422 F. 2d 538. The Board's decision and order (Pet. App. A1–A11, B1–B6) are reported at 173 NLRB No. 189.

JURISDICTION

The judgment of the court of appeals was entered on March 6, 1970 (Pet. 2). The petition for a writ of certiorari was filed on May 6, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

386-833—70

QUESTION PRESENTED

Whether the Board properly found that the union violated Section 8(b)(1)(A) of the National Labor Relations Act by causing two former members to lose their eligibility for employer-funded pension benefits because of nonmembership in the union.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are set forth at pp. 4–5 of the petition.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

The Peabody Coal Company's Midwest Mine is represented for collective bargaining by petitioner, Local Union No. 167, Progressive Mine Workers of America ("Local 167") (Pet. App. A4). Local 167's parent organization, Progressive Mine Workers of America, District No. 1, has negotiated a series of master collective bargaining agreements with the Coal Producers' Association of Illinois, a multiemployer group. Peabody has adopted these agreements by reference in its contracts with Local 167. (Pet. App. A2, A4).

Welfare and Retirement Pension Fund, Master Plan No. 7, is one of the employee benefit programs established by these agreements (Exh. 62–74, 32–35, 7–31).[1] The individual companies, including Peabody, contribute the funds for the plan at the rate of 40¢

[1] "Exh." refers to the Volume of Exhibits, and "R." refers to the testimony printed as an Appendix, in the court of appeals.

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per ton of coal mined. (Exh. 41–45). While contributions from all the mines are combined in one fund, they are contributed and accounted for on an individual-mine basis (Exh. 45–47). Accordingly, the method by which funds contributed for each mine are allocated to eligible persons can be altered in some details for each mine.

The Welfare and Retirement Pension Fund Plan provides that membership in PMW shall be a "prerequisite to eligibility" (Exh. 71, 52). Section 23 of the Special Allocation Plan for the Midwest Mine, governing the administration of the Plan as it applies to Midwest employees, provides in similar terms that "continuous Union membership" is necessary for eligibility and that "dropping of such membership shall automatically forfeit any funds then allocated or the right to any future allocations" (R. 17; Exh. 16).

Melvin Bosse and Marvin Ude, both PMW members, had worked at the Midwest Mine for more than 27 and 10 years, respectively. Both men were eligible for participation in the Welfare and Retirement Pension Plan. Under the plan, $3,164.47 was allocated to Ude as of November 1, 1965, and $8,154.95 was allocated to Bosse as of November 1, 1966. These amounts were to be paid in monthly installments upon retirement, or on an accelerated basis if the men quit the mines and worked outside the coal industry. (Pet. App. A4.)

On January 16, 1967, both Bosse and Ude quit their jobs at the Midwest Mine and were transferred by the Company to another mine, at which the employees are

represented by the United Mine Workers of America (Pet. App. A4). In accepting such employment, Bosse and Ude lost their union membership under Article VI, Section 5 of thePMW constitution, which provides in relevant part (Pet. App. A4–A5):

> Any member of the Progressive Mine Workers of America accepting employment in the coal industry in any mine not under contract with Progressive Mine Workers of America or International Union District 101, [shall] be immediately dropped from membership.

On the day they quit the Midwest Mine, Bosse and Ude presented to Local 167's financial secretary checks for $15.95, in payment of their union dues for the balance of the year (Pet. App. A4). On March 15, 1967, Local 167 mailed to Bosse and Ude identical letters, returning the checks and stating: "I am returning the moneys you presented to Finance Secretary Taylor for Cash Dues as it is in violation of the Dist. Constitution," referring to Article VI, Section 5, *supra*. In January 1968, when Bosse and Ude again sent checks for their union dues for the forthcoming year, Local 167 rejected the checks for the same reason (Pet. App. A4–A5).

The result of Local 167's action in rejecting the dues was to forfeit Bosse's and Ude's allocated pension funds and to deprive them of all PMW retirement benefits, or, in the event they quit working in the coal industry, of immediate monthly installment payments from their allocated funds (Pet. App. A5).

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B. THE DECISIONS BELOW

The Board found that Local 167 violated Section 8(b)(1)(A) of the Act by depriving Bosse and Ude of eligibility for pension and welfare benefits because their membership in that union had been terminated for accepting employment in a UMW mine. The Board also found that this action violated Section 8(b)(1)(A) in that it served as a warning to other Midwest employees that they too might lose such employment benefits if they similarly shifted jobs. (Pet. App. A6). The Board ordered Local 167, *inter alia*, to accept the dues of Bosse and Ude, as a service fee for continued participation in the PMW Welfare and Retirement Fund and to notify the trustees of that Plan that Bosse and Ude have at all times met Local 167's requirements for eligibility (Pet. App. B3). The court of appeals sustained the Board's findings and conclusions and enforced its order (Pet. App. C1–C9).

ARGUMENT

The decision of the court of appeals is correct and not in conflict with other decisions. There is no occasion for further review.

Section 8(b)(1)(A) of the Act (Pet. 5) bars a union from depriving an employee of his job or benefits flowing therefrom[2] for failure to comply

[2] Benefits from employer funded pension funds are "wages" under the Act. *Sylvania Electric Products, Inc.* v. *National Labor Relations Board*, 358 F. 2d 591, 592 (C.A. 1), certiorari denied, 385 U.S. 852; *National Labor Relations Board* v. *Stackpole Carbon Co.*, 128 F. 2d 188, 191 (C.A. 3); cf. *Lewis* v. *Benedict Coal Corp.*, 361 U.S. 459.

with union membership obligations other than the payment of periodic dues or initiation fees (where there is a valid union security agreement). *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 40–42. Here, Bosse and Ude were deprived of membership in Local 167 because, in violation of the Union constitution, they went to work in a UMW mine. In consequence, Local 167 caused them to lose their pension rights. Such action violates Section 8(b)(1)(A). *National Labor Relations Board* v. *Local 815, Teamsters*, 290 F. 2d 99, 102–103 (C.A. 2); *National Labor Relations Board* v. *Local 138, Operating Engineers*, 293 F. 2d 187, 198 (C.A. 2); *Melville Confections, Inc.* v. *National Labor Relations Board*, 327 F. 2d 689, 691 (C.A. 7), certiorari denied, 377 U.S. 933; *Dura Corp.* v. *National Labor Relations Board*, 380 F. 2d 970, 972 (C.A. 6).

The first four questions presented (Pet. 2–3) rest on the erroneous premise that the violation found by the Board consists of Local 167's depriving Bosse and Ude of union membership. As the Board stated, however, "the violations we find and here remedy are based upon the rejection of said service fees and resulting deprivation of rights under the Plan—not the denial of PMW membership as such. We are not here dealing with acquisition or retention of membership in the sense protected by the proviso to Section 8(b)(1)(A), and our decision is not intended to require the [Union] to confer membership status on Bosse and Ude" (Pet. App. B1–B2, n. 1). Accordingly, the Board's order merely requires Local 167 to accept a portion of Bosse's and Ude's dues as

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a service fee for administering their share of the Welfare and Retirement Pension Plan, according to a formula which the Union itself suggested in a related Board case, *Coal Producers' Assn. of Illinois,* 165 NLRB 337, 338–339.

Nor is there substance to petitioner's contention (Pet 3–4) that the Board's order will allow miners who switch mines to obtain double pension coverage. As the court below noted, "there are no assurances that an employee who transfers from a PMW mine to a UMW mine will satisfy the UMW eligibility requirements" (Pet. App. C8). Moreover, as the court added, "there is nothing in the Board's order which prevents the Union and the Company from renegotiating their Pension Plan to provide for such contingencies" (*ibid.*).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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